No. 84-571

(5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

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QUESTION PRESENTED

Whether 38 U.S.C. 3404, which prohibits the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with an administrative claim for veterans' benefits, violates the First or Fifth Amendments.

PARTIES TO THE PROCEEDING

In addition to appellant Walters, the defendants named in the district court were the United States, the Veterans' Administration, and Paul D. Ising, the Director of the VA Regional Office in San Francisco.

In addition to appellee National Association of Radiation Survivors, plaintiffs in the district court were Swords to Plowshares Veterans Rights Organization, Don E. Cordray, Albert R. Maxwell, Reason F. Warehime, and Doris J. Wilson. The American G.I. Forum also intervened as a plaintiff.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-52a) is reported at 589 F. Supp. 1302.

JURISDICTION

The district court's preliminary injunction (J.S. App. 52a) was entered on June 12, 1984. The district court's order modifying the preliminary injunction on the government's motion for a stay pending appeal (J.S. App. 53a-59a) was entered on July 20, 1984. Notices of appeal to this Court from the June 12 and July 20 orders were filed, respectively, on June 20, 1984 (J.S. App. 60a), and August 20, 1984 (J.S. App. 61a). On August 10, 1984, Justice Rehnquist extended the time within which to docket this appeal to and including October 1, 1984, and on September 11, 1984, he further extended the time for docketing the appeal to and including Octo-

ber 8, 1984 (a federal holiday). The appeal was timely docketed on October 9, 1984, and the Court noted probable jurisdiction on December 10, 1984. The jurisdiction of this Court rests upon 28 U.S.C. 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30-31 (1975); *Railway Labor Executives' Ass'n* v. *Gibbons*, 448 U.S. 1301, 1303-1304 & n.2 (Stevens, Circuit Justice), subsequent order, 448 U.S. 909 (1980).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 3404(c) provides:

> The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> (1) shall be determined and paid as prescribed by the Administrator;
>
> (2) shall not exceed $10 with respect to any one claim; and
>
> (3) shall be deducted from monetary benefits claimed and allowed.

38 U.S.C. 3405 provides:

> Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

STATEMENT

By statute, Congress has established an administrative system of service-connected death and disability benefits for veterans. See 38 U.S.C. 301 *et seq.* Since the time of the Civil War, Congress has limited the amount that

a veteran may pay to an agent or attorney for assistance and representation in connection with a claim for such benefits. As relevant here, 38 U.S.C. 3404(c) provides (subject to criminal penalties for receipt of greater sums, see 38 U.S.C. 3405) that "in allowed claims for monetary benefits under laws administered by the Veterans' Administration * * * [s]uch fees * * * shall not exceed $10 with respect to any one claim * * *."[1] Appellees contend that Section 3404(c) violates their Fifth Amendment right to procedural due process and their First Amendment rights of association and free speech and to petition for a redress of grievances.

1. At issue in this case are non-contractual benefits provided to veterans or their survivors for service-connected death or disability. These benefits are not based on financial need, or on length and type of service, or on negligence or other degree of fault; instead, they rest solely on the fact of a service-connected death or disability. In brief, dependency and indemnity compensation benefits are available to a veteran's surviving spouse, children, or dependent parents if the veteran dies as the result of injury or disease incurred in or aggravated by active military service (see 38 U.S.C. 401-417; 38 C.F.R. 3.312); monthly benefit rates are computed from the veteran's pay grade and range from $476 to $1305 for a surviv-

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[1] Section 3404 is applicable to fees in administrative proceedings. Judicial review of the decision of the Administrator on service-connected death and disability claims is expressly precluded by statute (see 38 U.S.C. 211(a); page 8, *infra*). In contrast, Congress has authorized suits on claims under certain veterans' insurance programs (see 38 U.S.C. 784(a)) and has allowed a fee not to exceed 10% of the amount recovered for representation in such suits (38 U.S.C. 784(g)). Contrary to the suggestion of appellees National Association of Radiation Survivors, et al., in their motion to affirm (NARS Mot. to Aff. App. 62a-63a, 66a-67a), the limitation in Section 3404 applies to the fees of an agent or attorney regardless of the nature of the work performed and is not confined to clerical tasks in preparing a claim. See *Hines* v. *Lowrey*, 305 U.S. 85, 89 (1938). However, Section 3404 does not bar reimbursement for expenses incurred in connection with a claim. See 38 C.F.R. 14.634(b).

ing spouse and from $240 for one child to $446 for three children (plus $90 for each additional child) where there is no surviving spouse (see 38 U.S.C. 411 and 413, as amended, Pub. L. No. 98-543, 98 Stat. 2735, 2736-2737).[2] Disability benefits are payable for partial or total disability that results either from an injury or disease occurring in active military service or from a pre-existing injury or disease aggravated in active military service (see 38 U.S.C. 310, 331); monthly benefit rates run from $66 for a 10% disability to $1,295 for a 100% disability, with additional compensation for certain severe disabilities and for dependents (see 38 U.S.C. 314, 315, 334, 335, as amended, Pub. L. No. 98-543, *supra*).[3] By statute and regulation, various presumptions are applicable in establishing that an injury or disease is service-connected. See 38 U.S.C. 311-313, 332, 333, 337, 353; 38 C.F.R. 3.303-3.309.

2. Claims for service-connected death and disability benefits are decided in an informal and nonadversary process.[4] The process is commenced by the submission of a claim for benefits (38 C.F.R. 3.151, 3.152). The necessary claims form is furnished by the Veterans' Administration either upon request or upon receipt of notice of death of a veteran (38 C.F.R. 3.150(a) and (b)). In

[2] Dependency and indemnity compensation benefits are payable only to those parents whose income does not exceed prescribed levels and who therefore are deemed to have been dependent on the veteran. See 38 U.S.C. 415. This is the sole consideration of financial need for beneficiaries in the service-connected death and disability program.

[3] Veterans' Administration statistics indicate that more than 80% of the veterans to whom disability benefits are paid receive a basic rate of $376 per month or less. See Office of Information Management and Statistics, Veterans' Administration, *Disability Compensation Data* 2 (IB70-84-3 May 1984).

[4] See generally S. Rep. 97-466, 97th Cong., 2d Sess. 86-87, 126-135 (1982); *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 178-200 (1983) [hereinafter *1983 House Hearings*].

addition, "[a]ny communication or action, indicating an intent to apply for one or more [veterans'] benefits * * *, may be considered an informal claim" and, "if a formal claim has not been filed, an application form will be forwarded to the claimant for execution" (38 C.F.R. 3.155(a)). In the event that "a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application" (38 C.F.R. 3.109(a)). No statute of limitations precludes a claimant from obtaining prospective benefits for a death or disability that occurred many years prior to the submission of an application.

A claim is initially reviewed by the so-called agency of original jurisdiction, which is usually the Regional Office of the Veterans' Administration that is most convenient to the claimant. These proceedings "are ex parte in nature" (38 C.F.R. 3.103(a)) and no government official appears in opposition to the claim. The VA has "the obligation * * * to assist a claimant in developing the facts pertinent to his claim" (*ibid.*), and "[a]ny evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records" (38 C.F.R. 3.103(b)).

The VA is also under an obligation "to render a decision which grants [the claimant] every benefit that can be supported in law while protecting the interests of the Government" (38 C.F.R. 3.103(a)), and "[i]t is the defined and consistently applied policy of the Veterans' Administration to administer the law under a broad interpretation * * *" (38 C.F.R. 3.102). Furthermore, "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant" (*ibid.*).

> Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from im-

> peachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records * * *.

Ibid.

A claimant is "entitled to a hearing at any time on any issue involved in a claim" (38 C.F.R. 3.103(c)). The purpose of the hearing is to permit the claimant to present any evidence or arguments that bear on the claim (*ibid.*). "It is the responsibility of the Veterans' Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position" (*ibid.*). Likewise, "questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony" (*ibid.*).

The claimant is notified of any decision on his claim, including "the reason for the decision," "the date it will be effectuated," and "the right to a hearing" (38 C.F.R. 3.103(e)). In the event of an adverse decision, the claimant is advised of his right to appeal and the applicable time limits for taking an appeal (*ibid.*; 38 C.F.R. 19.114). An appeal is initiated by filing a notice of disagreement (38 U.S.C. 4005(a); 38 C.F.R. 3.103(e), 19.118), which is "[a] written communication from a claimant or the representative expressing dissatisfaction or disagreement with * * * [the original] determination * * *. It need not be expressed in any special wording" (38 C.F.R. 19.117). A notice of disagreement may be filed at any time within one year of the initial decision (38 U.S.C. 4005(b)(1); 38 C.F.R. 19.129(a)).[5]

[5] An appeal is noticed in approximately 2.5% of the claims filed. See *1983 House Hearings* 44-45.

After a notice of disagreement is submitted, the agency of original jurisdiction may reconsider the claim (38 U.S.C. 4005(d)(1); 38 C.F.R. 19.119(a)).[6] If the decision remains adverse to the claimant, he is "entitle[d] * * * to a [s]tatement of the case for his assistance in perfecting his appeal" (38 C.F.R. 3.103(e); see also 38 C.F.R. 19.119(b)). "The statement of the case should provide the appellant notice of those facts and applicable laws and regulations upon which the agency of original jurisdiction based its determination of the issue or issues. It should be complete enough to allow the appellant to present written and/or oral arguments * * * [on appeal]" (38 C.F.R. 19.120(a)). In particular, a statement of the case is required to contain:

> (1) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement.
>
> (2) A summary of the applicable law and regulations, with appropriate citations.
>
> (3) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed:

38 C.F.R. 19.129(b); see also 38 U.S.C. 4005(d)(1). Following receipt of the statement of the case, a claimant perfects his appeal by completing and submitting a form that is provided to him by the VA (see 38 C.F.R. 19.121, 19.123).

Appeals in claims for service-connected death and disability benefits are within the jurisdiction of the Board of Veterans' Appeals (BVA). See 38 U.S.C. 4001, 4004; 38 C.F.R. 19.1, 19.2. The Board undertakes de novo review of the claim; it "exercise[s] the same authority as

[6] Of the approximately 69,000 notices of disagreement that were filed in fiscal year 1983, nearly 29,000 were resolved by the field office; of these, almost 9000 were allowed. See VA Ann. Rep. 114 (1983).

the department having original jurisdictional responsibility" (38 C.F.R. 19.1(a)) and has "jurisdiction * * * [as] to all questions" (38 C.F.R. 19.112(a); see also 38 U.S.C. 4004(a)).

Upon request, a claimant is entitled to a hearing on appeal (38 C.F.R. 19.157(a)). Hearings are held either in Washington, D.C., or at VA facilities around the country (38 C.F.R. 19.160). "The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue" (38 C.F.R. 19.157(b)). Like the previous proceedings on the claim, hearings before the BVA "are ex parte in nature and nonadversary" (38 C.F.R. 19.157(c)); although parties are allowed to ask questions, there is no formal cross-examination or rebuttal of evidence, and the rules of evidence do not apply (*ibid.*). The claimant may also be given an opportunity to submit additional evidence following the hearing (38 C.F.R. 19.164).

Based on the record, the Board may allow the claim in whole or in part, deny or dismiss it, or remand for further development (38 C.F.R. 19.180, 19.182).[7] The decision of the BVA on service-connected death and disability claims is final (38 C.F.R. 19.104) and is not subject to judicial review. 38 U.S.C. 211(a); *Johnson* v. *Robison*, 415 U.S. 361 (1974).[8]

3. A claimant is entitled to representation at all stages of the administrative process (38 C.F.R. 3.103(d), 19.150). Such representation may be provided by a member of a recognized organization (as discussed below), an attorney or agent (subject to the fee limitation

[7] During fiscal year 1983, the BVA allowed more than 5200 appeals and remanded nearly 6000 other appeals for further proceedings; approximately 400 appeals were withdrawn, and 27,000 appeals were denied. See VA Ann. Rep. 114 (1983).

[8] Although the decision of the BVA is final, liberal provisions exist for reconsidering a BVA decision and for reopening a denied claim on the basis of new evidence. See 38 C.F.R. 19.185-19.190, 19.194; see also 38 C.F.R. 3.104, 3.105, 3.156.

at issue here), or other person authorized to represent claimants. The VA has prescribed eligibility standards for each of these categories of representatives (see 38 U.S.C. 3401, 3404(a) and (b); 38 C.F.R. 14.626-14.637, 19.150-19.156) to ensure that claimants "have qualified representation in the preparation, presentation, and prosecution of claims for veterans' benefits" (38 C.F.R. 14.626).[9]

Under 38 U.S.C. 3402(a)(1), Congress has authorized the VA to recognize individuals from certain veterans' and service organizations as representatives "in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration."[10] The VA may furnish space and office facilities for the use of paid full-time representatives of such organizations (38 U.S.C. 3402(a)(2)). Recognition may be given to national or state veterans' organizations and to other veterans' organizations that are primarily involved in delivering services to veterans and that, inter alia, will provide complete claims service and undertake affirmative action, such as training and monitoring of their representatives, to ensure proper handling of claims (38 C.F.R. 14.628(d)(4) and (5), 14.628(e)(4) and (5)). In addition, in order to be recognized, representatives from these organizations must certify that "no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim" (38 U.S.C. 3402(b)(1)).

Pursuant to these provisions, there has developed "a strong and vital system of veterans service officers who

[9] In fiscal year 1983, approximately 86% of claimants were represented by service organizations and 2% by attorneys; in addition, 12% of claimants elected to represent themselves. See VA Ann. Rep. 115 (1983).

[10] The statute specifically enumerates the Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, and the Veterans of Foreign Wars. The Administrator may also recognize "such other organizations as he may approve" (38 U.S.C. 3402(a)(1)).

provide excellent representation at no cost to claimants." S. Rep. 97-466, 97th Cong., 2d Sess. 50-51 (1982).

> Most of the recognized veterans' organizations, and most of the States, work with claimants in the preparation, presentation, and prosecution of claims for benefits. These organizations maintain a staff of employees—well trained and experienced—who devote their full-time efforts to assisting veterans and other claimants on a strictly no-charge basis. These men and women are accredited as representatives of the organizations to the Veterans Administration and are accorded every permissible assistance by our personnel, including the right to inspect the individual veteran's claims folder under the authority of the veteran's power of attorney, filed with the VA. These representatives function not only at the Regional Offices and field stations but also here in Washington at the Central Office and before the Board of Veterans Appeals, both here and in the field.
>
> * * * [T]here are presently over * * * 2,800 people [accredited as service representatives], the great majority of whom are full-time paid employees, fully familiar with every facet of veterans' laws and VA regulations, with a thorough knowledge of our procedures and precedents, and with a wealth of experience gained through years of advocacy in behalf of claimants.

Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Pts. 1-2, at 457 (1973) (statement of VA General Counsel John J. Corcoran) [hereinafter *1973 Hearings*]; see also *id.* at 445-447. Appellees, dissatisfied with this system of representation, seek to retain private attorneys to pursue their benefit claims before the VA and thus challenge the validity of the fee restriction in 38 U.S.C. 3404(c).

4. This action was filed in the United States District Court for the Northern District of California in April 1983. Plaintiff-appellees are veterans' groups and individual veterans or their surviving spouses; no plaintiff class was requested or certified. Appellees alleged that the $10 fee limitation prevents veterans from retaining attorneys and that, in the absence of such representation, the administrative claims system is fundamentally unfair and denies veterans their Fifth Amendment right to procedural due process and their First Amendment rights of association and free speech and to petition for a redress of grievances. Following extensive discovery by appellees,[11] the district court concluded that appellees "have a high probability of success" on their constitutional arguments (J.S. App. 6a; see also *id.* at 40a, 41a, 47a, 48a) and entered a preliminary injunction against enforcement of 38 U.S.C. 3404 and 3405.[12]

With respect to the procedural due process issue, the district court recognized (J.S. App. 6a) that both this Court, summarily affirming the decision of a three-judge district court, and the Ninth Circuit had sustained the constitutionality of 38 U.S.C. 3404(c). *Gendron* v. *Levi*, 423 U.S. 802, aff'g *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975); *Demarest* v. *United States*, 718 F.2d 964 (1983), cert. denied, No. 83-1176 (Apr. 23, 1984). The court sought to distinguish these decisions, however, on the ground that they involved challenges to Section 3404 on its face and did not preclude an attack on the statute "as applied to the facts of this case" (J.S. App. 10a; see also *id.* at 7a n.7, 14a, 15a). The court remarked that "[i]t is particularly important to conduct a

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[11] As the district court recognized, appellees' discovery in this case was "extensive" (J.S. App. 12a) and involved "a great deal of evidence" (*ibid.*), including depositions of seven VA officials and interrogatories and requests for documents that led to the government's production of more than 25,000 pages of material. Appellees themselves acknowledge that they engaged in "six months of extensive discovery" (Br. in Opp. to Stay 1).

[12] The district court had previously denied the government's motion to dismiss the complaint, finding that appellees had stated a claim under both the Due Process Clause of the Fifth Amendment and the First Amendment. See J.A. 97-121.

careful inquiry into a statute's application to all the facts of the case at hand where that statute is being challenged as violative of procedural due process" (*id.* at 11a), and it noted (*id.* at 12a) that appellees

> have engaged in extensive discovery * * * [and] have gathered a great deal of evidence regarding the way the claims process functions and whether it tends to be adversarial, the extent to which VA employees or service organization representatives are able to aid veterans in gathering supporting materials and presenting their claims, the special difficulties posed by such complex claims as those relating to Agent Orange or radiation-related illnesses, the way in which the lack of an attorney renders veterans unable to present their claims adequately, and the financial hardship imposed on veterans by the $10.00 limit. They have also presented statistical evidence regarding the success rates of various types of * * * claims before the several levels of the VA.

Based on this evidence, the district court determined that, while the VA process was designed to be informal and nonadversarial (J.S. App. 32a-33a), "both the procedures and the substance entailed in presenting * * * claims to the VA are extremely complex" (*id.* at 30a) and "particularly so with respect to those claimants seeking to obtain benefits for deaths or disabilities arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome" (*id.* at 32a). The court also concluded that, because of resource limitations, neither service organization personnel representing claimants nor VA employees are able to devote the same time and resources to a case that a retained attorney could (*id.* at 27a, 33a, 36a, 37a-38a). As the court explained (*id.* at 33a, 37a-38a (footnote omitted)):

> [N]either the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to

> claimants. Even assuming that all VA personnel were prepared to do everything that they could to build claimants' cases for them, it is clear that the resources of the VA are insufficient to permit the substantial investment of time that would be necessary.
>
> * * * * *
>
> [Appellees] do not deny that such [service] organizations provide substantial service, but argue simply that due to these organizations' limited resources, they are unable to provide the full array of services which a paid attorney might provide. * * * Given the very limited extent to which either the VA personnel or service organization representatives are able to assist veterans or their families in bringing service-related death and disability claims, the vast substantive and procedural complexities facing such claimants, and the important need of such claimants, the $10.00 fee limitation deprives plaintiffs of the ability to make a full presentation of their claim to the VA.

The district court also held that, independently of the Due Process Clause, the First Amendment entitles the individual appellees to "meaningful" (J.S. App. 45a) and "effective" (*ibid.*) access to the VA and protects the right of the organizational appellees to "provid[e] adequate legal services to their members" (*id.* at 40a). The court determined (*id.* at 47a) that appellees "have submitted vast numbers of depositions, declarations, and documents demonstrating that claimants' inability to employ counsel for a fee of more than $10.00 severely impedes their efforts to investigate and present their death and disability claims to the VA." Finding that *Gendron* and *Demarest* had not presented First Amendment challenges to Section 3404(c) (J.S. App. 40a-41a), the court concluded that appellees had "shown a high probability of success on their First Amendment claim" (*id.* at 48a).

Finally, the district court held that appellees had demonstrated that they would suffer irreparable injury if a preliminary injunction were denied and that the balance

of hardships between the parties was in their favor (J.S. App. 48a-51a). Accordingly, the district court entered a broad preliminary injunction against enforcement of Sections 5404(c) and 3405; that injunction is of nationwide scope, is not limited to the appellees in this case, is not confined to unusually complex or complicated cases, and is not otherwise restricted to instances in which the court believed that the claims procedure would be unfair or inadequate in the absence of a retained attorney.[13] In addition, the court required the VA to take various affirmative steps to remove references to the fee limitation in its forms and other documents and to post a summary of the preliminary injunction in VA offices across the country. J.S. App. 52a. On the government's motion for a stay pending appeal, the district court modified the injunction with regard to certain provisions concerning implementation, but in all other respects it denied a stay. *Id.* at 53a-59a.

On September 27, 1984, Justice Rehnquist granted the government's application for a stay of the district court's injunction pending direct appeal to this Court. On October 9, 1984, the Court denied appellees' motion to vacate that stay.

SUMMARY OF ARGUMENT

The district court has held unconstitutional a century-old federal statute that limits the fees that may be charged to represent a claimant for veterans' benefits. This statute has previously been sustained by both this Court and other courts. Moreover, Congress has repeatedly examined the fee limitation and, as recently as last session, has adhered to it. Nevertheless, the court below reviewed the operation of the VA claims system and invalidated the statute on the basis of its conclusion—contrary to the determination of Congress—that the system is adversarial in nature and that the VA and the veterans' service organizations do not provide adequate representation to claimants. In thus holding that the right to retain an attorney without regard to the statutory fee limit is necessary to a fundamentally fair administrative procedure, the district court followed an erroneous method of analysis and reached an incorrect result.

1. To begin with, the district court's preliminary injunction against enforcement of the fee limitation in 38 U.S.C. 3404(c) is utterly inappropriate to the procedural deficiencies it found in the claims system. As the statute and administrative regulations make plain, the VA process was established to be informal and nonadversarial. Insofar as there has been a deviation in practice from that approach, the proper remedy would be to require that the system be brought into compliance with its intended operation, not to set aside the fee limitation. The relief ordered by the district court ignores Congress's choice to create an informal and nonadversarial system and will alter the basic nature of the process in a way that further departs from the congressional design.

2. But more importantly, the district court's holding of unconstitutionality is erroneous. Because the district court's ruling is premised on an error of law, it is subject to plenary review in this Court.

a. Section 3404(c) does not deny veterans the fundamental fairness required by procedural due process. As this Court has held in many other situations, the presence of retained counsel is not necessary to a fair procedure. The fee limitation must be judged in the context of the informal and nonadversarial claims system for processing veterans' benefits, in which the VA is responsible for assisting veterans to establish their claims and service organizations are available to provide expert representation to veterans without charge. In addition, the fee limit ensures that veterans' benefits are not depleted through payments to counsel and that veterans are protected from overreaching and unscrupulous attorneys.

[13] Indeed, the district court's injunction applies to claims for every type of VA monetary benefit and is not limited to service-connected death and disability claims, which is all that appellees sought to challenge.

These considerations fully justify the fee limit. Accordingly, Congress's effort to establish an alternative dispute resolution mechanism in this area does not violate the Due Process Clause.

The district court's decision to the contrary derives from its conclusion, based on the record submitted by the parties in this litigation, that the VA claims system in fact does not operate in an informal and nonadversarial manner and that the service organizations do not provide adequate assistance to claimants. However, Congress has recently inquired into the nature and operation of the claims system and has determined that the system *is* informal and nonadversarial and that the service organizations *do* provide effective representation. The district court simply disregarded these legislative determinations and undertook to conduct a legislative-type hearing on the general workings of the VA process. In so doing, it ignored separation-of-powers principles and the special competence of Congress to analyze questions of legislative fact. By failing to accord substantial deference to the determinations of Congress, the district court misconceived the proper role of the judiciary and its relationship to the legislative branch of government.

Congress has given considerable attention to the fee limitation over the past 120 years, and that attention continues to the present. The objections that appellees raise to the soundness and desirability of the fee limit have been considered by, and continue to be considered by, Congress. Congress's choice among available alternatives, and the wisdom of its policy, are not matters for constitutional adjudication. In our democratic system of government, the reasonableness of Section 3404(c) must be left to the legislature, not resolved by the courts in the guise of procedural due process.

b. Nor does Section 3404(c) violate a First Amendment right of association and speech and to petition for a redress of grievances. Given that the VA claims process is fair and adequate without privately retained attorneys, the fee limitation does not interfere with any First Amendment right to effective and meaningful access to the agency. Likewise, the fee limit does not prevent veterans from engaging in collective activity, or veterans' organizations from furnishing a wide range of supporting services (including legal advice and representation), provided only that the claimant is not charged more than $10. Finally, this case plainly differs from those that the Court has previously considered, in which the assistance of counsel was clearly required in order adequately to pursue legal rights in a contested and adversary proceeding. Nothing in the First Amendment implies that the fee limit is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge.

ARGUMENT

THE DISTRICT COURT ERRED IN INVALIDATING THE FEE LIMITATION IN 38 U.S.C. 3404(c)

The present challenge to the constitutionality of 38 U.S.C. 3404(c) bears a heavy burden. This Court has long recognized that Acts of Congress are presumptively constitutional and will be upset only by a clear showing of invalidity.[14] Such a presumption is especially appropriate in this case. First, the predecessor of Section 3404(c) was enacted in 1862, and a strict limitation on fees for retained counsel has been in place since that time;[15] the longstanding history of the fee provision

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[14] See, *e.g.*, *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 23; *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32 (1963); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1870); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

[15] The history and development of the statutory fee limitation are traced in the appendix to our motion to affirm in *Gendron*, a copy of which has previously been sent to counsel for appellees. See also *Hines* v. *Lowrey*, 305 U.S. 85, 88-90 (1938); *1973 Hearings* 458-459, 500-501.

Congress and administrative agencies have adopted a number of other provisions limiting the fees that claimants in various gov-

provides a substantial refutation of the claim that the statute suffers from a latent and previously undiscovered defect.[16] Moreover, this Court, as well as lower courts, have—until the instant case—consistently rejected attacks on the constitutionality of the fee limitation, including attacks based on procedural due process grounds;[17] the absence of a successful challenge over the last century is telling evidence against the district court's novel holding. Finally, as we discuss in detail below (see pages 38-46, *infra*), Congress has repeatedly examined the fee limitation and, as recently as last session, has adhered

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ernment programs may pay to attorneys or agents. A compilation of these provisions is reprinted in *1973 Hearings* 566-570, 583-587; see also, *e.g.*, 31 U.S.C. 3721(i); 42 U.S.C. 406.

[16] See, *e.g.*, *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 3, 6-7; *Ludecke* v. *Watkins*, 335 U.S. 160, 171 (1948); cf. *Bank-America Corp.* v. *United States*, No. 81-1487 (June 8, 1983), slip op. 9; *Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982); *Hurtado* v. *United States*, 410 U.S. 578 (1973); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959).

[17] See *Gendron* v. *Levi*, *supra*; *Demarest* v. *United States*, *supra*. See also, *e.g.*, *Hines* v. *Lowrey*, *supra*; *Margolin* v. *United States*, 269 U.S. 93 (1925); *Frisbie* v. *United States*, 157 U.S. 160 (1895); *United States* v. *Hall*, 98 U.S. 343 (1878); *Bodey* v. *United States*, 495 F.2d 1370 (4th Cir.) (Table), cert. denied, 419 U.S. 899 (1974); *Hoffmaster* v. *Veterans Administration*, 444 F.2d 192 (3d Cir. 1971); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd, 477 F.2d 600 (6th Cir.) (Table), cert. denied, 414 U.S. 1023 (1973); *Gostovich* v. *Valore*, 153 F. Supp. 826 (W.D. Pa. 1957), appeal dismissed, 355 U.S. 608 (1958), aff'd, 257 F.2d 144 (3d Cir. 1958), cert. denied, 359 U.S. 916 (1959); *United States* v. *Marks*, 26 F. Cas. 1162 (C.C.D. Ky. 1869) (No. 15,721); *Staub* v. *Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), vacated for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (Table); *United States* v. *Fairchilds*, 25 F. Cas. 1035 (W.D. Mich. 1867) (No. 15,067); *In re Guardianship of Copsey's Estate*, 10 Cal. 2d 748, 76 P.2d 691, cert. denied, 304 U.S. 574 (1938); *In re Descamp's Estate*, 405 Pa. 331, 175 A.2d 827 (1961); cf. *Yeiser* v. *Dysart*, 267 U.S. 540 (1925); *Newman* v. *Moyers*, 253 U.S. 182 (1920); *Calhoun* v. *Massie*, 253 U.S. 170 (1920); *Dana* v. *Dana*, 250 U.S. 220 (1919); *Capital Trust Co.* v. *Calhoun*, 250 U.S. 208 (1919).

to it.[18] In entering a preliminary injunction against the enforcement of Section 3404(c), the district court too lightly cast aside a provision steadfastly retained by Congress and uniformly upheld by the courts. See *Walters* v. *National Association of Radiation Survivors*, No. A-214 (Sept. 27, 1984) (Rehnquist, Circuit Justice).

Furthermore, the injunctive relief ordered by the district court was entirely misconceived and inappropriate to the procedural deficiencies it found. As described above (see pages 4-10, *supra*), the veterans' benefit statute and implementing regulations make clear that the VA claims system is designed to be an informal and nonadversarial process. It cannot be doubted that Congress, in creating a statutory benefit program, may depart from the traditional litigation model for adjudicating claims and instead follow an alternative approach in which lawyers are not necessary to a fair procedure. This is precisely what Congress has done here. If, as the district court believed, the claims system is fundamentally unfair because it is operating in a more formal and adversarial fashion than Congress intended,[19] the appropriate remedy would be to require that the system conform to the congressional directive, not to invalidate the fee limitation and thereby work a further deviation from Con-

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[18] In addition, in 1967 the Veterans' Administration, at the direction of the President, established a United States Veterans' Advisory Commission to make a comprehensive study of the benefits system. Based on extensive review and public hearings, the Commission recommended that no change be made in the fee limitation provision. The Commission's study and recommendations were submitted to Congress. See *U.S. Veterans' Advisory Commission: Hearing Before the House Comm. on Veterans' Affairs*, 90th Cong., 1st Sess. 2554-2555 (1967); *Report of U.S. Veterans' Advisory Commission: Hearing Before the House Comm. on Veterans' Affairs*, 90th Cong., 2d Sess. 2713, 2741, 2822 (1968).

[19] In their motion to affirm in this Court, appellees heavily rely on the assertions that "[a]ctual adjudicative policies and practices [of the VA] often markedly diverge from CFR requirements" (NARS Mot. to Aff. 11) and that the VA frequently acts "[c]ontrary to its own rules and regulations" (*id.* at 17).

gress' purpose. By striking down the fee limitation in order to increase the participation of lawyers in the VA process, the district court's action can only result, contrary to Congress's intent, in an even more formal and adversarial claims process. Accordingly, assuming arguendo that the VA system works in an adversarial manner that is contrary to legislative intent and inconsistent with constitutional standards of fairness, it was nevertheless improper for the district court to enjoin the fee limitation rather than to direct compliance with the mandate of Congress.

Beyond this, however, our primary submission is that the district court's holding of unconstitutionality was erroneous. It is to this argument that we now turn. After first establishing that the ruling below is subject to review in this Court for legal error, we shall show that the informal and nonadversarial system created by Congress for veterans' benefit claims does not violate due process; the district court's conclusion to the contrary, based on its independent examination of the general functioning of the system, improperly ignored Congress's determination of the nature and operation of the VA procedure. In addition, we shall show that nothing in this system infringes on the First Amendment rights that appellees assert.

I. THE DISTRICT COURT'S HOLDING OF UNCONSTITUTIONALITY IS SUBJECT TO REVIEW IN THIS COURT FOR LEGAL ERROR

In their motion to affirm, appellees contend (NARS Mot. to Aff. 1, 20-21 & n.2) that the district court's order preliminarily enjoining Section 3404(c) may be reviewed by this Court only for an abuse of discretion. We submit that appellees' standard is unduly narrow, especially where, as here, the constitutionality of an Act of Congress is at issue. Because the district court's preliminary injunction rests on an error of law, it is subject to plenary review in this Court.

The Court has previously reversed preliminary injunctions that were premised on legal error. See *Withrow* v.

Larkin, 421 U.S. 35, 46, 55 (1975); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938); see also *Houchins* v. *KQED*, 429 U.S. 1341, 1344 (1977) (Rehnquist, Circuit Justice). Lower federal courts have likewise recognized that appellate review of a preliminary injunction extends to the correctness of the district court's ruling on questions of law. See, *e.g.*, *Roland Machinery Co.* v. *Dresser Industries, Inc.*, No. 84-1509 (7th Cir. Dec. 21, ~~Aug. 31~~, 1984), slip op. 8, 17, 18-19; *Bell* v. *Sellevold*, 713 F.2d 1396, 1399-1400 (8th Cir. 1983), cert. denied, No. 83-852 (Jan. 16, 1984); *Rennie* v. *Klein*, 653 F.2d 836, 840-841 (3d Cir. 1981) (en banc), vacated on other grounds, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983) (en banc); *Wright* v. *Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981); *Buffalo Courier-Express* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 59-60 (2d Cir. 1979) (Friendly, J.); *Delaware & H. Ry.* v. *United Transportation Union*, 450 F.2d 603, 620-621 (D.C. Cir.) (Leventhal, J.), cert. denied, 403 U.S. 911 (1971); see also 7 *Moore's Federal Practice* ¶ 65.21, at 65-154 & n.26 (1984).

It is, of course, axiomatic that a district court "lacks discretion to apply the law improperly." *Wright* v. *Rushen*, 642 F.2d at 1132. And "'on questions of law [the appellate court] owe[s] no deference * * * to the [d]istrict [c]ourt'" (*Bell* v. *Sellevold*, 713 F.2d at 1399 (citation omitted)); rather, "[i]f the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound." *Delaware & H. Ry.*, 450 F.2d at 620. Thus, "[i]nsofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court" (*ibid.*). For these reasons, and in order to ensure that the district court's "exercise of a power so far-reaching * * * [is] subject to effective, and not merely perfunctory, appellate review" (*Roland Ma-*

chinery Co., slip op. ~~17~~ 19, see also *Buffalo Courier-Express*, 601 F.2d at 59), a preliminary injunction—particularly a preliminary injunction preventing enforcement of a federal statute on constitutional grounds—should be "set aside if the district court erred in the legal standard it applied in its review of the probability of success on the merits." *Wright* v. *Rushen*, 642 F.2d at 1132.

To be sure, it is an oft-cited "rule of practice" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. at 52) that a preliminary injunction is to be reviewed under the abuse-of-discretion standard and "ordinarily * * * will not be disturbed on appeal" (*ibid.*). But this "narrow standard of review springs from the realization that the proof at a hearing for a preliminary injunction is abbreviated and that the trial court, under time pressures, may not have the opportunity for the more mature consideration of issues that is expected in usual adjudications." *Rennie* v. *Klein*, 653 F.2d at 840. As a result, it may be appropriate for an appellate court to review a preliminary injunction under a deferential "abuse of discretion" standard if, for example, the need for an expeditious ruling at the trial level precludes the development of a full factual record on which the outcome of the controversy will turn. See, *e.g.*, *University of Texas* v. *Camenisch*, 451 U.S. 390, 394-396, 398 (1981); *Brown* v. *Chote*, 411 U.S. 452, 456-457 (1973). That rationale is inapplicable here, however. First, as we argue below (see pages 33-38, *infra*), the factual proceedings in the district court are irrelevant to a proper disposition of this case; in any event, the district court had ample opportunity to consider the issues in a lengthy opinion, and appellees engaged in extensive discovery to support their request for an injunction. Compare *Roland Machinery Co.*, slip op. ~~16~~, *Rennie* v. *Klein*, 17-18 653 F.2d at 841. Moreover, the district court's decree, while formally a preliminary injunction, is an exceedingly broad order (see page 14, *supra*) that does not simply preserve the status quo pending trial (see 7 *Moore's Federal Practice* ¶ 65.04[1], at 65-36 (1984); *Camenisch*,

451 U.S. at 395) but instead changes the existing situation and grants the complete affirmative relief that would be sought in a permanent injunction. Compare *Rennie* v. *Klein*, 653 F.2d at 841.[20]

In these circumstances, there is no obstacle to the Court's review on the merits of the legal validity of the preliminary injunction entered below. Because, as we now demonstrate, the district court's order is premised on a decisive legal error, it should be reversed.[21]

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[20] As we pointed out in our jurisdictional statement (at 23 n.15) and as appellees did not dispute in their motions to affirm, it appears that the issue of a permanent injunction probably would not have been resolved by the district court for a year or more, and therefore the preliminary injunction in this case, unlike in many other cases, was intended to be in effect for an extended period.

[21] In addition, in an appeal from a preliminary injunction, an appellate court has jurisdiction to review the denial by a district court, as in this case (see page 11 note 12, *supra*), of a motion to dismiss the complaint. See, *e.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 286-287 (1940), and cases cited therein; *Energy Action Educational Foundation* v. *Andrus*, 654 F.2d 735, 745-746 & n.54 (D.C. Cir. 1980), rev'd on other grounds *sub nom. Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981); *FTC* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1310-1311 (D.C. Cir. 1968); see also *Alligator Co.* v. *LaChemise Lacoste*, cert. denied, 421 U.S. 937, 938 n.* (1975) (White, J., joined by Blackmun and Powell, JJ., dissenting). By enabling the appellate court (which otherwise has jurisdiction by virtue of the appeal from the preliminary injunction) to reverse the erroneous denial of a motion to dismiss, this rule saves both the lower court and the parties from the needless delay and expense of further proceedings. See *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 523-525 (1897). Because, for the reasons discussed below, the district court erred in denying appellants' motion to dismiss, the Court should reverse that ruling and order the complaint dismissed.

II. SECTION 340(c), AS AN INTEGRAL PART OF THE INFORMAL AND NONADVERSARIAL VETERANS' BENEFIT SYSTEM ESTABLISHED BY CONGRESS, DOES NOT VIOLATE PROCEDURAL DUE PROCESS

A. Procedural Due Process Is Satisfied By A Fundamentally Fair Procedure That Affords A Meaningful Opportunity To Be Heard

Procedural due process is a guarantee of fundamental fairness. See *Santosky* v. *Kramer*, 455 U.S. 745, 754 (1982); *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24, 33 (1981). This standard does not require that administrative processes be subject to the "'wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976), quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). On the contrary, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Eldridge*, 424 U.S. at 348. Simply put, "[the] fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And the requisites of procedural fairness are to be framed in terms of "the generality of cases, not the rare exceptions." *Eldridge*, 424 U.S. at 344; see also, *e.g.*, *Santosky* v. *Kramer*, 455 U.S. at 757; *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979); *Parham* v. *J.R.*, 442 U.S. 584, 612-613 (1979).

In determining whether an administrative system affords a meaningful opportunity to be heard, "'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Eldridge*, 424 U.S. at 334, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The Due Process Clause "'is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed.'" *Lassiter*,

452 U.S. at 31, quoting *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788 (1973). Thus, within broad bounds, Congress is free to experiment with different administrative mechanisms and to adapt the procedures it prescribes to the decisional context at hand. See *Parham* v. *J.R.*, 442 U.S. at 608 n.16; *Whalen* v. *Roe*, 429 U.S. 589, 597-598 (1977). An administrative process is constitutionally sufficient if it affords the claimant "'the right to support his allegations by argument however brief, and, if need be, by proof, however informal.'" *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 16 n.17 (1978), quoting *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908).

Of course, given the inherent nature of due process, application of the constitutional principle in any particular situation will not be governed by a bright-line test. See *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975). Rather, a careful weighing of the relevant public and private interests is required. See *Eldridge*, 424 U.S. at 334-335. But in undertaking that inquiry, courts must be mindful that

> [t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. * * * Thus, it would be improper simply to impose * * * procedures * * * because the reviewing court may find them preferable. Instead, the courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process * * *.

Landon v. *Plasencia*, 459 U.S. 21, 34-35 (1982). As Justice Holmes observed, "[g]reat constitutional provisions must be administered with caution * * *, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry.* v. *May*, 194 U.S. 267, 270 (1904).

B. In Light Of The Informal And Nonadversarial Claims System In Which Service Organizations Provide Effective Assistance To Veterans Without Charge, Section 3404(c) Does Not Deny Claimants A Fundamentally Fair Procedure

Under the foregoing standard, 38 U.S.C. 3404(c) is not violative of due process. The district court concluded (J.S. App. 23a) that procedural due process requires the right to be represented by an attorney. However, this Court has recognized that a lawyer (whether retained or appointed) is not always necessary to a fair proceeding and that the interest in being represented by counsel in a given procedural setting must be assessed in light of competing societal considerations. See *Lassiter*, *supra*; *Baxter* v. *Palmigiano*, 425 U.S. 308, 312, 314-315 (1976); *Middendorf* v. *Henry*, 425 U.S. 25 (1976); *Goss* v. *Lopez*, 419 U.S. at 583; *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974); *Gagnon* v. *Scarpelli*, 411 U.S. at 787-788; *Vitek* v. *Jones*, 445 U.S. 480, 499-500 (1980) (Powell, J., concurring in part); cf. *Schweiker* v. *McClure*, 456 U.S. 188, 199 n.14 (1982); *Parham* v. *J.R.*, 442 U.S. at 607. Viewed in the context of the informal and nonadversarial claims system in which veterans are provided expert representation by service organizations without charge, the fee limitation in Section 3404(c) does not deny fundamental fairness.[22]

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[22] The district court heavily relied (see pages 12-13, *supra*) on its view that the VA and the service organizations have inadequate resources to provide the same level of preparation and assistance to every claimant that a privately retained representative could. Even assuming that to be true, however, the court's concern would not implicate a right to *counsel*; presumably a Legal Services attorney (who would not charge a fee and thus would not be constrained by Section 3404(c) from representing a client), or indeed a representative from a service organization who happens to be a lawyer, would labor under the same sorts of institutional and resource limitations. A right to counsel must rest on the special capabilities of an attorney and cannot be invoked to further other objectives that have little if anything to do with the role of lawyers. See *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 10-11.

The VA system is designed to process a high volume of largely fact-bound claims "swift[ly]" and "efficient[ly]." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).[23] To achieve this objective, the benefit claims procedure is, as described above (see pages 4-10, *supra*), nonadversarial and informal.[24] The VA is specifically charged to grant claimants all benefits that can be supported, and, consistently with that obligation,

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[23] In 1983, nearly 3 million cases involving service-connected death and disability claims (as well as more than 1.5 million non-service-connected claims, which are subject to the same administrative procedures and fee limitations) were on the VA rolls. Moreover, the Board of Veterans' Appeals decided over 38,000 cases in 1983 and had approximately 64,000 appeals pending at the end of the year. VA Ann. Rep. 63, 113-114 (1983).

[24] This nonadversarial procedural system is reflective of the broader relationship between the government and veterans. "The solicitude of Congress for veterans is of long standing." *United States* v. *Oregon*, 366 U.S. 643, 647 (1961); see also pages 31-32 & note 30, *infra*. In addition to service-connected death and disability benefits, Congress has provided a wide range of services and assistance for veterans, including "pensions, homes, hospitals and other facilities" (*United States* v. *Oregon*, 366 U.S. at 647), educational and vocational benefits, readjustment and counseling help, and housing and small business loans. See 38 U.S.C. 301-1000, 1500-2021 (chs. 11-43); see also, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 550-551 (1983); *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 554-560 (1981); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 261 (1979); *Johnson* v. *Robison*, 415 U.S. at 374-383. In effect, "programs in aid of veterans have evolved into a comprehensive welfare system" and generally are of "more generous dimensions" than other government benefit programs. S. Levitan & K. Cleary, *Old Wars Remain Unfinished* ix, 27 (1973). Congress's special concern for veterans is also reflected in the substantive provisions of the service-connected death and disability system; for example, unlike many other programs, such benefits are available for partial as well as total disability, and a variety of legal presumptions may be invoked by the claimant to establish his eligibility. It would be unwarranted to view the VA claims procedure, including the fee limitation, in isolation by wresting it from the broader context of the supportive and nonadversarial position of the government toward veterans.

it administers the law under a broad interpretation and resolves any reasonable doubt in favor of the claimant. The VA is also responsible for assisting the claimant to develop the relevant facts and for suggesting facts helpful to his position that the claimant might have overlooked. Throughout the proceeding no VA personnel—whether lawyers or nonlawyers—appear in opposition to the claimant or seek to act as an adversary. Strict rules of evidence and procedure do not apply, and there is no formal cross-examination or rebuttal of evidence. Finally, the procedural rules applicable to the system are exceptionally liberal—for example, a claimant may initiate a benefit claim by an informal request and is not precluded from seeking benefits for a continuing disability that arose many years before; a claimant has a full year to take an appeal to the BVA from an adverse initial decision; and BVA decisions may be reconsidered or reopened without regard to the usual standards of finality and preclusion such as res judicata.[25] Compare *Santosky* v. *Kramer*, 455 U.S. at 759-764; *Lassiter*, 452 U.S. at 29; *id.* at 37, 42-44, 47-48, 50 n.18 (Blackmun, J., dissenting); *Middendorf* v. *Henry*, 425 U.S. at 40-41, 45; *Wolff* v. *McDonnell*, 418 U.S. at 569-570; *Gagnon* v. *Scarpelli*, 411 U.S. at 787-789; *Richardson* v. *Perales*, 402 U.S. 389, 400-401, 403 (1971).[26]

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[25] 38 U.S.C. 211(a), which bars judicial review of the VA decision on benefit claims, also reflects the informal and nonadversarial nature of the process. Among other things, the preclusion of judicial review serves to ensure that the claims procedure remains expeditious and inexpensive and that the technical and complex determinations of the VA are not forced into the more rigid format of judicial decisionmaking. See *Johnson* v. *Robison*, 415 U.S. at 370.

[26] We also note that appeals in claims involving Agent Orange or radiation exposure are treated by the BVA as specialty areas and are assigned only to panels designated to handle them. See VA Ann. Rep. 114-115 (1983). In addition, the BVA has sought to maintain its expertise in these areas through, *e.g.*, its relations with the VA's Agent Orange projects office and the Army Agent Orange Task Force (*id.* at 115).

In addition, accredited representatives of service organizations offer free assistance to the veteran in understanding the process and presenting his claim. These service officers are "well trained and experienced," and they are "fully familiar with every facet of veterans' laws and VA regulations, with a thorough knowledge of [VA] procedures and precedents, and with a wealth of experience gained through years of advocacy in behalf of claimants." *1973 Hearings* 457 (statement of VA General Counsel Corcoran). Such representatives provide "excellent representation at no cost to claimants" and "'render sophisticated and expert assistance in prosecuting a claim.'" S. Rep. 97-466, *supra*, at 50-51 (citation omitted). See also Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan. L. Rev. 905, 915, 918-919 (1975).[27] Compare *Baxter* v. *Palmigiano*, 425 U.S. at 311-312, 315; *Wolff* v. *McDonnell*, 418 U.S. at 570; *Vitek* v. *Jones*, 445 U.S. at 499-500 (Powell, J., concurring in part).[28]

The assistance provided by service officers is well-suited to the types of issues that generally arise in the VA process. As the district court recognized (J.S. App. 28a, 31a), benefit claims largely turn not on legal issues but on medical and vocational issues such as the nature and cause of the death or disability, whether the injury or disease was incurred or aggravated during military service, and the extent or "rating" of the claimant's disability. See also Rabin, *supra*, 27 Stan. L. Rev. at 918. Moreover, questions of credibility and demeanor do not play a significant role in the decision of these matters.

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[27] The role of service organizations is further discussed below (see pages 38-43, *infra*).

[28] In their motions to affirm (NARS Mot. to Aff. 6-8; American G.I. Forum Mot. to Aff. 2), appellees describe the VA system as though service organizations did not exist and veterans were required to proceed entirely unassisted. By virtually ignoring the service representatives, appellees have distorted an integral feature of the congressional design.

To be sure, medical and vocational issues may sometimes be difficult to resolve and require complex analysis and specialized judgment. But there is surely no reason to believe that only those people who possess legal training are qualified to provide assistance on such questions, and nothing in the Due Process Clause dictates that attorneys rather than skilled non-lawyer representatives must be involved in order to render the process fundamentally fair. Compare *Parham* v. *J.R.*, 442 U.S. at 607, 609; *Eldridge*, 424 U.S. at 343-345 & n.28; *Richardson* v. *Perales*, 402 U.S. at 404; *Vitek* v. *Jones*, 445 U.S. at 499-500 (Powell, J., concurring in part).

The fee limitation is an important aspect of the informal and nonadversarial claims system that Congress has established. See *Gendron* v. *Saxbe*, 389 F. Supp. at 1307. As the Court has recognized, "'[t]he introduction of counsel into a * * * proceeding will alter significantly the nature of the proceeding' * * * [and] would inevitably give the proceeding[] a more adversary cast * * *." *Wolff* v. *McDonnell*, 418 U.S. at 569-570, quoting *Gagnon* v. *Scarpelli*, 411 U.S. at 787. See also *Baxter* v. *Palmigiano*, 425 U.S. at 314-315. Thus, the "presence of counsel will turn a brief, informal hearing * * * into an attenuated proceeding which consumes * * * resources * * * to a degree which Congress could properly have felt to be beyond what is warranted." *Middendorf* v. *Henry*, 425 U.S. at 45.[29] Section 3404(c), by restricting

[29] The Court has noted that the added expense of more formal and complex procedures may work to the ultimate detriment of claimants by diverting from benefit payments to administrative costs the limited funds allocated to the program. See *Eldridge*, 424 U.S. at 348:

> [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost * * * may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

See also *Gendron* v. *Saxbe*, 389 F. Supp. at 1307.

the participation of lawyers, helps to ensure the informality and nonadversarial nature of the claims process.

The fee limitation in Section 3404(c) serves several other legitimate purposes as well. For example, it "protect[s veterans] and secure[s] to them the use of the [payments] granted in their behalf" by ensuring that such funds "inure solely to the benefit of the [veteran]" and are not diminished by lawyer's fees (*United States* v. *Hall*, 98 U.S. at 353-354; see also *United States* v. *Fairchilds*, 25 F. Cas. at 1037);[30] in light of the VA's obligation to assist in establishing a claim and the availability of free assistance from the service organizations, Section 3404(c) guarantees that benefit payments will go to eligible veterans as Congress intended and will not be consumed in attorney's fees for legal representation that, in the overall context of the VA system, Congress concluded was not necessary to a fair disposition.[31] In

[30] Federal veterans' benefits were first established by Congress in the Act of Sept. 29, 1789 (1 Stat. 95). See *United States* v. *Hall*, 98 U.S. at 346. From the beginning, Congress has "enact[ed] such regulations as will secure to the beneficiaries of the pensions granted the exclusive use and benefit of the money appropriated and paid for that purpose" (*id.* at 352). For example, in the Act of Mar. 23, 1792, Congress prohibited the "sale, transfer or mortgage * * * of the pension * * * [of a] soldier * * * before the same shall become due" (1 Stat. 245). See also *United States* v. *Hall*, 98 U.S. at 349-352. The limitation on attorney's fees, first adopted during the Civil War, was "[f]or the same purpose and to the same end" (*id.* at 353)—"to prevent the diversion of pension-money from inuring solely to the use and benefit of those to whom the pensions are granted" (*id.* at 354).

[31] In enacting the various predecessors of the fee limitation now contained in 38 U.S.C. 3404(c), Congress has indicated its view that the claims system should provide benefits to eligible veterans without diminution and that the retention of a paid attorney—with the concomitant reduction in benefits that the veteran eventually receives—is not needed. See, *e.g.*, Cong. Globe, 41st Cong.,

addition, the limitation "protect[s] just claimants from extortion or improvident bargains" in their dealings with unscrupulous attorneys (*Calhoun* v. *Massie*, 253 U.S. at 173) and thus prevents overreaching and sharp practices. See *Staub* v. *Johnson*, 519 F.2d 298, 300 (D.C. Cir. 1975); *United States* v. *Marks*, 26 F. Cas. at 1163.[32] And, by eliminating any possible incentive for counsel to bring unwarranted claims, it guards "the Treasury from frauds and imposition" (*Calhoun* v. *Massie*, 253 U.S. at 173).[33]

All of these considerations support the fee limitation in Section 3404(c). To achieve these objectives, Congress has, in effect, set up an alternative dispute resolution procedure in which lawyers are not necessary to a fair determination of benefit claims. Because VA benefits are "gratuities" (*Lynch* v. *United States*, 292 U.S. 571, 577 (1934)) that are funded entirely from public appropriations and do not involve financial contributions from veterans, Congress should be accorded particularly wide latitude to structure the process by which claims are adjudicated and benefits paid. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134, 151-155 (1974) (plurality opinion); *Calhoun* v. *Massie*, 253 U.S. at 176. The district court erred in striking down this legislative "experiment" in claims procedure and in substituting a claims system that, as we now show, Congress has repeatedly rejected.[34]

2d Sess. 1965, 4459 (1870); 7 Cong. Rec. 4841 (1878); 22 Cong. Rec. 146 (1890); 22 Cong. Rec. 2176, 2177, 2178, 2185, 2187 (1891); H.R. Rep. 471, 65th Cong., 2d Sess. 1 (1918); 56 Cong. Rec. 5222, 5223, 5224 (1918).

[32] See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 2101, 2102, 3119 (1862); Cong. Globe, 41st Cong., 2d Sess. 1967, 4459 (1870); 7 Cong. Rec. 4840 (1878); H.R. Rep. 471, 65th Cong., 2d Sess. 1-2 (1918); 56 Cong. Rec. 5221, 5223 (1918).

[33] See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 4459 (1870); 15 Cong. Rec. 3240 (1884); 22 Cong. Rec. 2180 (1891).

[34] In their motion to affirm, appellees rely (NARS Mot. to Aff. 2, 16) on the assertion that the VA seldom grants benefits in so-

C. Congress Has Determined That The VA Claims System Operates In A Fair And Nonadversarial Manner, And The District Court Improperly Failed To Defer To That Congressional Determination

The district court invalidated Section 3404(c) on the basis of its conclusion, drawn from the record generated

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called "complex" claims such as those involving Agent Orange or radiation exposure. Even accepting appellees' implication that some of these cases were incorrectly decided, that would not establish that the claims system—let alone the fee limitation in particular—violates due process. See *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979); *Parham* v. *J.R.*, 442 U.S. at 612-613. But more importantly, there is no reason to believe either that such denials were erroneous or that they resulted from the absence of retained counsel.

Of particular significance is the recent "Agent Orange" litigation in the United States District Court for the Eastern District of New York. See *In re "Agent Orange" Product Liability Litigation*, MDL No. 381 (E.D.N.Y. filed Feb. 23, 1979). Begun in 1979, that class action sought damages from a large number of chemical companies for the deaths and disabilities of Vietnam veterans allegedly caused by exposure to Agent Orange and other herbicides. Immediately prior to trial, the defendants agreed, without admitting liability, to settle the litigation for $180 million plus interest. In reviewing the proposed settlement, Judge Weinstein, based on a thorough consideration of the extensive record in that case, found several difficulties in the plaintiffs' claims that led him to conclude that the settlement was favorable to the class and should be approved. For example, in its Preliminary Memorandum and Order on Settlement (Sept. 25, 1984), the court pointedly stated that "[t]he critical problem for the plaintiffs is to establish that the relatively small quantities of dioxin [the toxic ingredient in Agent Orange] to which service-persons were exposed in Vietnam caused their present disabilities. Here adequate proof is lacking" (*id.* at 115). This weakness on the issue of causation was repeatedly noted by the court (*e.g.*, *id.* at 11, 12, 15, 96, 104, 110-150, 216, 217, 269). As the court summarized the matter (*id.* at 103, quoting plaintiffs' memorandum):

> The basic problem with the plaintiffs' factual case * * * [is that the] "class action * * * is now careening toward a trial in May without the basic information necessary to establish a causal relation between exposure to dioxin contaminated phenoxy herbicides in Vietnam and the illness, disability, and death of the plaintiff veterans. There is not sufficient command

by the parties in this case, that in fact the VA claims system does not operate in an informal and nonadversarial way, that the assistance the VA and the service organizations provide to claimants is inadequate, and that the procedure is fundamentally unfair and hence a violation of due process in the absence of a right to retain an attorney without regard to the statutory fee limitation. These conclusions, which are essential to the holding below, are contrary to the determinations that Congress recently made concerning the nature and operation of the claims procedure. The district court simply disregarded the legislative assessment and, based on the evidence submitted by the litigants, undertook to re-weigh essentially the same contentions that had been presented to Congress and to make de novo findings on the same issues regarding the general workings of the VA sys-

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of the biological, chemical, medical, epidemiological, and genetic evidence to establish a causal relation between the disease, disability, and death of the plaintiff veterans much less the catastrophic polygenetic birth defects afflicting their children."

The court reiterated the same deficiency in the plaintiffs' case in a hearing on the issue of attorney's fees, emphasizing again that "[t]he veterans have not shown, and the lawyers, despite their great work in favor of the veterans, have not been able to demonstrate that Agent Orange caused the veterans problems" and that "I find and have found that [plaintiffs have] shown no factual connection of any substance between the diseases and the alleged cause" (9/26/84 Tr. 8, 20; see also 10/1/84 Tr. 55, 63).

Congress, too, has recently noted the lack of evidence of causation between exposure to Agent Orange or radiation and subsequent death or disability. In the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 2, 98 Stat. 2725 (which is discussed further at pages 44-45 note 44, *infra*), Congress specifically concluded that "[t]here is scientific and medical uncertainty regarding such long-term adverse health effects [from exposure to herbicides containing dioxin or to ionizing radiation]." And in Section 3 of the Act (98 Stat. 2727), Congress stressed that veterans' benefits for dioxin or radiation exposure are to be provided for "disabilities arising after * * * service that are connected, *based on sound scientific and medical evidence*, to such service" (emphasis added).

tem. In effect, the district court conducted a new set of legislative-type hearings and second-guessed the determinations that Congress had reached. This was not within the district court's province.[35]

In a wide variety of areas, the Court has recognized that a district court's

> "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion * * *." "It makes no difference that the facts [relied on by the legislature] may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

Vance v. *Bradley*, 440 U.S. 93, 111-112 (1979), quoting *Firemen* v. *Chicago, R.I. & P.R.R.*, 393 U.S. 129, 138-139 (1968), and *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916). Thus, "[i]t is not for the courts to reexamine the validity of * * * legislative findings and reject them" (*Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94 (1961)) or "to substitute * * * [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker* v. *Goldberg*, 453 U.S. 57, 68 (1981); see also *id.* at 81-83.[36]

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[35] Because it was inappropriate for the district court to conduct an evidentiary proceeding in the circumstances presented here, we have no occasion to discuss the record or the court's asserted findings of fact. That should not be taken, however, to suggest in any way that we accede to the court's characterization of the evidence. To the extent it proves necessary to this Court's understanding of the case, we shall respond in our reply brief to any factual submissions that appellees seek to rely on.

[36] See also, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 26 n.18; *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976); *CSC* v. *Letter Carriers*, 413 U.S. 548, 566-567 (1973); *Radice* v. *New York*, 264 U.S. 292, 294 (1924); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199, 207, 228-230 (1971).

This principle of judicial restraint "is a limitation stemming, not from the * * * [substantive constitutional standard being applied], but from the nature of judicial review. * * * The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication." *Oregon* v. *Mitchell*, 400 U.S. 112, 247-248 (1970) (opinion of Brennan, White, and Marshall, JJ.). In reviewing the constitutionality of a federal statute—" 'the gravest and most delicate duty that [the judiciary] is called upon to perform' " (*Rostker* v. *Goldberg*, 453 U.S. at 64 (citation omitted))—courts are to be guided by due regard for the proper separation of functions and for the superior ability of the legislature to gather information and analyze issues of legislative fact.[37] Indeed, this principle is particularly appropriate with respect to questions of procedural fairness, since "procedural due process rules are shaped by the risk of error inherent to the truthfinding process as applied to the generality of cases, not the rare exceptions." *Eldridge*, 424 U.S. at 344. Just as the legislature in *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), was "in a far better position than a court to form a correct judgment concerning" the fairness and adequacy of a statutory grace period for a new law (*id.* at 532), so, too, in this case Congress is better able than a district court to appraise the fairness and adequacy of the operation of the VA claims system.

To be sure, it is the ultimate responsibility of the judiciary to decide whether the constitutional standards of

[37] See, *e.g.*, *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131 (June 15, 1983), slip op. 27; *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504-505 (1975); *Branzburg* v. *Hayes*, 408 U.S. 665, 693-694 (1972); Cox, *supra*, 40 U. Cinn. L. Rev. at 209, 255; see also *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 2 (Blackmun, J., concurring); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, No. 81-746 (June 15, 1983), slip op. 5 n.4, 14-15 (O'Connor, J., dissenting).

due process are satisfied.[38] But in addressing that question, the courts are not free to ignore the legislature's findings concerning those subjects of broad and general applicability—such as are involved in understanding and evaluating the nature of the VA claims procedure—that are not matters of historical or adjudicative fact and do not lend themselves to resolution through the judicial process in litigation between two parties. Where, as here, a broad challenge is made to the constitutionality of a federal statute, the validity of the statute does not vary from case to case and district to district depending upon the record that the parties develop in the particular lawsuit.

Of course, in discharging its legislative function, Congress is not required to make factual determinations. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980); *Katzenbach* v. *McClung*, 379 U.S. 294, 299, 304 (1964); see also *Whalen* v. *Roe*, 429 U.S. at 598. But where Congress has done so, a court must defer to those determinations unless they are "so clearly wrong that [they] may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.' " *Oregon* v. *Mitchell*, 400 U.S. at 248 (opinion of Brennan, White, and Marshall, JJ.); see also, *e.g.*, *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. at 94-95; *Block* v. *Hirsh*, 256 U.S. 135, 154 (1921). And such deference is especially appropriate in this case because the congressional determination involves the operation of an administrative system that Congress itself has created and the ex-

[38] Even in making that legal determination, courts should give substantial weight to the views of Congress and the responsible agency concerning the procedures necessary to ensure fairness in the administrative process. See *Middendorf* v. *Henry*, 425 U.S. at 43-44; *Eldridge*, 424 U.S. at 349; *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973); *Arnett* v. *Kennedy*, 416 U.S. 134, 202 (1974) (White, J., concurring in part and dissenting in part); see also *Rostker* v. *Goldberg*, 453 U.S. at 64; *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion); *CSC* v. *Letter Carriers*, 413 U.S. at 567.

tent to which that system is, as Congress intended, informal and nonadversarial.

In light of this principle, the district court clearly erred in invalidating the fee limitation in Section 3404(c) based on its view of the workings of the VA benefit system. Congress has expressly inquired into that issue in recent years and determined, contrary to the conclusion of the district court, that the system operates fairly and that veterans receive effective assistance in presenting their claims.

Over the last decade, a number of bills have been introduced in Congress to modify the VA claims system in various respects, including modification of the fee limitation in Section 3404(c). See S. 636, 98th Cong., 1st Sess. (1983); S. 349, 97th Cong., 1st Sess. (1981); S. 330, 96th Cong., 1st Sess. (1979).[39] Each of these bills passed the Senate but failed of adoption in the House. In the course of considering these and other proposals, Congress undertook an extensive examination of the VA procedure and gave particular attention to the limitation on attorney's fees. This legislative treatment leaves no doubt that Congress determined that the operation of the process is fair and adequate.[40]

The principal congressional statement on this issue is the recent report of the Senate Committee on Veterans'

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[39] See also S. 364, 95th Cong., 1st Sess. (1977), which, following hearings, was redrafted and introduced in the 96th Congress as S. 330.

Bills have also been introduced in the current Congress to amend Section 3404(c) and to provide for judicial review of VA benefit decisions. See H.R. 585, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. H146-H147 (daily ed. Jan. 24, 1985); H.R. 313, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. E6 (daily ed. Jan. 3, 1985).

[40] Indeed, the very fact that Congress has deliberately retained the fee limitation for more than a century indicates its view that such a provision does not undermine the fairness and adequacy of the nonadversarial claims system. See *Staub* v. *Johnson*, 519 F.2d 298, 300 (D.C. Cir. 1975); *Gendron* v. *Saxbe*, 389 F. Supp. at 1307.

Affairs. See S. Rep. 97-466, 97th Cong., 2d Sess. (1982).[41] In its general summary of the bill, the Committee noted with approval "the VA's present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant." *Id.* at 19; see also *id.* at 27. It also specifically recognized that VA claimants are given

> some advantages not afforded to claimants before other agencies * * * [, including] the VA's very liberal standards for the admission of evidence, and free representation before the VA by skilled officers of the various national veterans' service organizations—advantages which are often credited for the informal, "nonadversarial" nature of VA proceedings. * * * [T]he Committee[] [has] abiding respect both for the high quality of representation offered by the veterans' service organizations and for the BVA's expertise as an arbiter of factual issues.

Id. at 25; see also *id.* at 26. And the Committee explained, in connection with a proposed provision for judicial review of VA benefit decisions, that the bill was not based on any concern that "wide-spread injustices [exist under the current system]; to the contrary, there is no evidence that most claimants are not satisfied with the resolution of their claims." *Id.* at 24; see also *id.* at 38. Hence, the Committee found that "the existing internal adjudications procedures of the VA are generally fair and workable." *Id.* at 31; see also *id.* at 32.

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[41] The most recent bill, S. 636, was substantially similar to the predecessor bill, S. 349, and therefore the committee report on S. 636 reaffirmed and incorporated by reference the previously issued report. See S. Rep. No. 98-130, 98th Cong., 1st Sess. 23 (1983); see also *id.* at 17, 22, 48, 53-54. S. Rep. 97-466, discussed in the text, is the report accompanying S. 349. See also S. Rep. 96-178, 96th Cong., 1st Sess. 23-25, 52-56, 64 (1979); this report, which accompanied S. 330, is similar to S. Rep. 97-466 in its treatment of the relevant issues (although we note that S. 330 would have allowed greater fees for attorneys following the issuance of the statement of the case rather than, as under S. 349 and S. 636, following the BVA's decision, see page 40, *infra*).

With particular reference to the issue of the fee limitation, the Committee expressed its

> concern[] that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters. The mainstays of that network are veterans' service officers, employees of national veterans' service organizations, and other organizations approved pursuant to present section 3402 of title 38, who provide representation without charge to veterans and other claimants before the VA, without regard to whether the individual claimant is a member of the service officer's organization. It is widely recognized, as the VA noted * * * [,] that veterans' service officers "render sophisticated and expert assistance in prosecuting a claim", and the Committee strongly believes that the availability of their services should be maintained and fostered.

S. Rep. 97-466, *supra*, at 49-50. Thus, the Committee concluded that "there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants." *Id.* at 50-51.

These considerations were reflected in the amendment to Section 3404(c) that the Committee reported, which would have left standing the $10 fee limitation for administrative proceedings through the decision of the BVA and would have allowed greater fees only for subsequent administrative stages (such as motions to reconsider or reopen) and suits for judicial review (as authorized in the bill). See S. Rep. 97-466, *supra*, at 23, 49-54. The Committee recognized that retained attorneys would generally be inappropriate for the submission and initial processing of a claim, since the procedure is relatively uncomplicated, the VA is responsible for securing the relevant medical records, and service organizations provide free representation; accordingly, "there would seem

to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application." *Id.* at 50. Likewise, "even if the initial decision is adverse, the Committee believes that it may be unnecessary for a claimant to incur the substantial expenses for attorney representation that may be involved in appealing the case for the first time" (*ibid.*); as the Committee observed, the initiation and pursuit of an appeal are "very simple" (*id.* at 51; see also *id.* at 51-52), and the "claimant may well prevail, as many claimants currently do, without legal representation when the case is first before the BVA" (*id.* at 50). For these reasons, "continuing to discourage attorney representation at the initial application, decision and appeal stages would * * * appropriately serve to protect claimants' benefits * * *. [The bill] is intended to continue to restrict attorney representation in the initial claims process." *Id.* at 50, 51; see also *id.* at 53, 63.

In contrast, "once the BVA renders a decision adverse to the claimant on the merits, the need for the assistance of an attorney is then markedly greater with respect to such issues as seeking a reopening and reconsideration and deciding whether to proceed to court [as allowed under the bill]." S. Rep. 97-466, *supra*, at 50. In that circumstance, where there is "a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court * * * [, the] claimant could well conclude * * * that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record." *Id.* at 51; see also *id.* at 53.

Two conclusions clearly emerge from this discussion. First, the Committee was fully satisfied with the assistance provided to the claimant by the VA and the service organizations, and it considered the administrative system to be informal, nonadversarial, and fair. Second, in

connection with a new provision for judicial review, the Committee proposed to amend Section 3404(c) to permit greater fees to be paid to retained attorneys in—but only in—the reconsideration stage of the administrative process and in judicial proceedings. These conclusions flatly contradict the district court's assessment in this case that the VA claims process is adversarial and formal, that the VA and the service organizations furnish inadequate assistance to claimants, and that the administrative system is fundamentally unfair in the absence of retained attorneys; indeed, even when Congress contemplated an increased role for attorneys incident to judicial review, it retained a fee limitation for the basic administrative process that is irreconcilable with the view taken by the district court here.

In considering an amendment to the fee limitation, Congress was fully apprised of the nature and operation of the VA benefit system. Various bills were before Congress over a number of years, and extensive hearings were held on these proposals as well as on other matters concerning the VA and attorney's fees.[42] And, of particular significance, Congress was informed that claimants represented by service organizations have virtually the same rate of success—and in some instances a higher rate—than claimants represented by an attorney. See S. Rep. 96-178, *supra*, at 101; *Veterans' Administration Ad-*

[42] See, *e.g.*, S. Rep. 97-466, *supra*, at 81-139; *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983), *e.g.*, *id.* at 58, 64, 67, 93, 109; *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983), *e.g.*, *id.* at 39-46, 57, 178-182. Similar hearings were conducted in 1977, 1979, 1980, and 1981; these proceedings are summarized in S. Rep. 97-466, *supra*, at 37, and S. Rep. 96-178, *supra*, at 16-17. See also *1973 Hearings* 444-463.

judication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 Before the Senate Comm. on Veterans' Affairs, 98th Cong., 1st Sess. 67, 237, 252-256, 259 (1983). This empirical measure of performance strongly reinforces Congress's conclusion about the adequacy of the representation furnished by service organizations and the fairness of the claims system.

In sum, Congress has recently determined, based on a substantial legislative record, that the VA claims procedure is informal and nonadversary, that the VA and the veterans' service organizations provide expert assistance to claimants without charge, that retained attorneys are unnecessary to a fair administrative procedure, and that a large influx of paid attorneys in the administrative proceedings would be undesirable. In the face of these considered legislative conclusions, the district court erred in reaching a contrary result. A lawsuit between specific parties in a single court cannot serve as a forum to go behind the findings of Congress by conducting a legislative-type hearing on the overall operation of a complex nationwide benefit program.

D. The Wisdom Of The Fee Limitation Policy Is For Congress To Decide

We recognize that policy objections may be raised to the fee limitation in Section 3404(c). For example, it could be argued that the $10 maximum has become obsolete and that a higher figure would be appropriate. Likewise, some would consider that another form of limitation—such as a percentage of the benefit award rather than an absolute dollar amount—is preferable. And others might contend that there should be no fee limitation of any kind. Such arguments, however, must be addressed to Congress rather than to the courts.[43]

[43] See, *e.g.*, *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984), slip op. 11; *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981);

The constitutional issue in this case is not the wisdom of Congress's action, nor "whether Congress could have done a better job." *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 13 (Stevens, J., concurring in part and dissenting in part); see also *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 27. "A wise public policy * * * may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter*, 452 U.S. at 33. Insofar as there is dissatisfaction and disagreement over the policy of the fee limitation, that is a matter for Congress. "The Constitution presumes that * * * even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted). In the end, "Congress which creates and sustains [administrative] agencies must be trusted to correct whatever defects experience may reveal." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. at 146.

In fact, the history of the fee limitation "shows that the political system is working." *Vance* v. *Bradley*, 440 U.S. at 97 n.12. As noted above, Section 3404(c) has recently been under active consideration by Congress, which thus far has declined to eliminate or amend the fee limit.[44] Moreover, many of the criticisms asserted by

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Harris v. *McRae*, 448 U.S. 297, 325-326 (1980); *Bell* v. *Wolfish*, 441 U.S. 520, 542 n.25 (1979); *Hurtado* v. *United States*, 410 U.S. 578, 591 (1973); *James* v. *Strange*, 407 U.S. 128, 133 (1972); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-262 (1964).

[44] In addition, although declining to alter the fee limitation, Congress has not been unmindful of the concerns expressed by appellees. For example, Congress recently enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 *et seq.*, which requires the VA to pay veterans' benefits on an interim basis for certain skin and liver diseases possibly caused by Agent Orange, to evaluate studies of the health effects of exposure to dioxin and radiation,

appellees have been presented to and rejected by Congress over the past 120 years. For example, appellees complain that the fee limit is paternalistic and deprives veterans of the opportunity to decide for themselves whether to hire counsel; the same concern has been voiced to Congress, including at the time a fee limitation was first enacted in 1862.[45] It also has been argued in Congress, as appellees argue here, that some veterans may not be able to establish their claims without the assistance of retained counsel.[46] Similarly, the contention—reiterated by appellees—has been advanced in Congress that the fee limit is too strict and that a greater fee would be appropriate in cases of unusual difficulty or complexity that require additional time and effort.[47] And it has been urged in Congress, just as appellees urge in this case, that the VA procedure is adversarial in

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and to publish regulatory guidelines for compensating veterans for disabilities resulting from such exposures in service; the Act also creates an independent scientific panel to advise the VA about the relation between health problems and herbicides or radiation. As Congress declared in Section 3 of the Act (98 Stat. 2727):

> The purpose of this Act is to ensure that Veterans' Administration disability compensation is provided to veterans who were exposed during service in the Armed Forces * * * to a herbicide containing dioxin or to ionizing radiation * * * for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service * * *.

[45] See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 3119 (1862) (remarks of Sen. Foster); 7 Cong. Rec. 4840 (1878) (remarks of Sen. Conkling); 22 Cong. Rec. 2185 (1891) (remarks of Sen. Cockrell).

[46] See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 4459 (1870) (remarks of Sen. Buckingham); 7 Cong. Rec. 4840 (1878) (remarks of Sen. Conkling); *id.* at 4841 (remarks of Sen. Spencer, Sen. Conkling, and Sen. Christiancy); 56 Cong. Rec. 5223, 5225 (1918) (remarks of Rep. Juul).

[47] See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 4459 (1870) (remarks of Sen. Edmunds and Sen. Thayer); 22 Cong. Rec. 2176 (1891) (remarks of Sen. Hawley); *id.* at 2188 (remarks of Sen. Cockrell).

nature, that the VA seeks to oppose claims for benefits, and that the assistance provided to veterans in the administrative process is inadequate.[48] In each instance, Congress has rejected that view and refused to disturb the fee limitation. Especially in light of Congress's century-long experience with Section 3404(c), the continued viability of that provision should be left to the legislative arena. See Baldridge v. Shapiro, 455 U.S. at 361.

III. SECTION 3404(c) DOES NOT VIOLATE A FIRST AMENDMENT RIGHT TO MEANINGFUL AND EFFECTIVE ACCESS TO THE VA PROCESS

The district court also held that Section 3404(c) violates appellees' First Amendment rights of association and speech and to petition for a redress of grievances. This ruling is plainly in error, and the line of decisions

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[48] See, *e.g.*, 7 Cong. Rec. 4841 (1878) (remarks of Sen. Conkling); 22 Cong. Rec. 2179 (1891) (remarks of Sen. Platt); 56 Cong. Rec. 5225 (1918) (remarks of Rep. Dewalt); 65 Cong. Rec. 7862 (1924) (remarks of Sen. Oddie); *id.* at 11013 (remarks of Rep. Newton).

[49] For the reasons stated in our motion to affirm (at 8-9) in *Gendron* and in our brief in opposition (at 5 & n.8) in *Demarest* (a copy of which was previously sent to counsel for appellees), we also submit that initial applicants for VA benefits (as distinguished from current recipients) do not have a property interest protected by the Due Process Clause. Nevertheless, we do not press that argument here. First, for the reasons already discussed, we believe that the VA system affords due process and therefore is valid even assuming that a property interest is implicated. Moreover, it appears that at least one of the individual appellees was an actual recipient whose benefits were sought to be reduced (see J.S. App. 3a), and presumably the organizational appellees include others who are in the same position; in light of this circumstance, the Court will have to resolve the constitutional adequacy of the VA system regardless of whether initial applicants for benefits have a protectable property interest. Accordingly, the Court need not decide in this case the question of an initial applicant's property interest in requested veterans' benefits.

upon which the district court relied is inapposite.[50] Nothing in the First Amendment suggests that the fee limitation is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge.[51]

In our view, this case does not present a First Amendment issue that is separate and independent from the due process question. The First Amendment decisions cited by the district court rest on the need for "effective" and "meaningful" representation. *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 584-585 (1971).[52] Since, as demonstrated above, the existing VA claims procedure is fair and adequate without privately retained attorneys, there is no basis in the First Amendment for inferring a right to counsel as necessary to effectuate the freedoms of association, speech, and petition for redress. Nor does the First Amendment guarantee of meaningful access entail an absolute right to be assisted by the individual representative of one's choosing. Cf. *Morris* v.

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[50] See *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576 (1971); *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of Railway Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963).

[51] The district court's ruling is also inconsistent with *Staub* v. *Roudebush*, 424 F. Supp. 1346, 1349 (D.D.C. 1976), vacated for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (Table). See also *Hoffmaster* v. *Veterans Administration*, 315 F. Supp. 62, 64-65 (E.D. Pa. 1970), aff'd, 444 F.2d 192 (3d Cir. 1971).

[52] See also *In re Primus*, 436 U.S. 412, 426 (1978) (citation omitted) (" 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment' "); *Bates* v. *Arizona Bar*, 433 U.S. 350, 376 n.32 (1977); *Roberts* v. *United States Jaycees*, No. 83-724 (July 3, 1984), slip op. 7 (O'Connor, J., concurring); *Minnesota Bd. for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 10 & n.11 (Stevens, J., dissenting).

Slappy, 461 U.S. 1 (1983); *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463 (1979).[53]

In addition, Section 3404(c) does not prevent veterans from associating together or petitioning the VA for redress. Nor does it prevent veterans' organizations from furnishing supporting services to veterans, including legal advice and representation.[54] The only proviso is that any fee charged a veteran in connection with a claim not exceed $10. In view of the extensive associational and support activity that is unfettered, the fee limitation does not infringe the First Amendment. Cf. *Minnesota Bd. for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 16-18.[55]

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[53] For example, the First Amendment surely would not require that "a group * * * [must be allowed to] employ a layman to represent its members in court or before an agency because it felt that his low fee made up for his deficiencies in legal knowledge." *United Mine Workers* v. *Illinois Bar*, 389 U.S. at 228 (Harlan, J., dissenting).

[54] Indeed, appellee Swords to Plowshares retains attorneys to represent claimants without charge. See Declaration of Thomas A. Verrill (Apr. 15, 1983), and Declaration of Charles C. Coyle (Apr. 15, 1983), which were filed in the district court as part of the government's opposition to the plaintiffs' request for early discovery.

[55] In *United Transportation Union* v. *Michigan Bar*, *supra*, the Court declared unconstitutional a state restriction on a union's ability to limit the fees charged its members by lawyers it recommended (401 U.S. at 577-578, 584); as the Court stated, "[i]t is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel" (*id.* at 585). Likewise, in *United Mine Workers* v. *Illinois Bar*, *supra*, the Court stated that the First Amendment protected a union program that provided legal assistance without charge to the union member, thus ensuring that "[t]he full amount of any settlement or award is paid directly to the injured member. The attorney receives no part of it" (389 U.S. at 221). As previously discussed, similar considerations underlie the fee limitation in Section 3404(c).

Finally, the cases advanced for a contrary constitutional rule have no application here. Each of those cases involved a contested and adversarial process in which the assistance of counsel was clearly required in order adequately to pursue the legal rights involved. As the Court explained in *Brotherhood of Railway Trainmen* v. *Virginia Bar*, 377 U.S. 1, 7 (1964), a state cannot

> infringe in any way the right of individuals * * * to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries * * *. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights.

Furthermore, in those cases it was unquestionably permissible for the claimant to retain an attorney to prosecute his cause; the only issue was the authority of the state, acting pursuant to its power to regulate the practice of law, to interfere with the claimant's exercise of that right by, for example, restricting information bearing on his decision. In contrast, Section 3404(c) must be judged in the context of the informal and nonadversarial VA process in which service organizations provide expert representation for free, and it is justified by legitimate and substantial interests that are entirely unrelated to any attempt to impair the claimant's informed exercise of his procedural rights. Accordingly, the fee limitation in Section 3404(c) is a far cry from the situations that this Court has previously addressed, and the decisions relied on by the district court do not undermine the constitutional validity of that longstanding congressional policy.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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